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7 UNITED STATES DISTRICT COURT
8 NORTHERN DISTRICT OF CALIFORNIA
9 SAN FRANCISCO DIVISION

10 UNITED STATES OF AMERICA,) No. CR-07-00678-JSW
11 Plaintiff,) DEFENDANT GLENIO SILVA'S
12 Vs.) MOTION TO DISMISS THE INDICTMENT
13 GLENIO JESUA FERREIRA SILVA,) FOR SELECTIVE PROSECUTION AND
14 Defendant.) PURSUANT TO THE COURT'S
SUPVISORY POWERS
15) Honorable Jeffrey S. White
16) Date: August 21, 2008 @ 2:30 pm
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THIS IS NOTICE that on August 21, 2008, at 2:30 p.m., defendant Glenio Silva will move this Court for an Order dismissing the Indictment. This motion is based on the Indictment, the defendant's previous motions, defense declarations, the record in this case and the arguments contained herein as well as to be presented at the hearing on this matter.

INTRODUCTION

This costly federal prosecution involves the alleged harboring of six illegal aliens who worked at two small pizzerias in the Northern District of California. Defendant Glenio Silva

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1 operates and manages these “mom and pop” pizzerias.¹ This case does not involve involuntary
 2 servitude, harsh working conditions or any inhumane treatment.² There are no accusations that
 3 *Monterey Pizza* or *The Pizza House* served as hotbeds of criminal activity or unsavory conduct.
 4 Apart from unfounded allegations from a government informant, whose identity the prosecution
 5 refuses to disclose, Mr. Silva has not engaged in any criminal activity whatsoever.³

7 At the last hearing, the Court denied defendant Glenio Silva’s motion ordering additional
 8 discovery from the government predicated on the claim of selective prosecution. Without the
 9 benefit of a transcript, defense counsel recalls that the Court pointed to the high threshold
 10 needed, not only to order discovery for a selective prosecution motion, but also necessary to
 11 support dismissing an indictment. Mindful of that hurdle, as well as the deeply carved separation
 12 of powers which serves our system of government, the defense nevertheless files this motion also
 seeking the Court’s supervisory powers to dismiss the indictment.

13 Admittedly, the defense seeks extraordinary relief. Equally true, however, is the conclusion
 14 that the totality of circumstances comprising this investigation and prosecution are likewise
 15 extraordinary.

16 In addition to an unconstitutionally arbitrary prosecution, the Court should utilize its
 17 supervisory powers as further justification to dismiss the indictment. The Court’s supervisory

19 ¹ Glenio Silva is a lawful permanent resident of the United States, married to a United States citizen and has two
 20 children with his wife. He has no criminal history. Mr. Silva has been in the United States since approximately
 1991 when he came to the United States to work on a diary farm in Wisconsin.

21 ² To the contrary, as government material witness Gilson De Aragujo testified, he asked Mr. Silva if he could stay at
Monterey Pizza because he had no other place to go, not because he needed safe haven from immigration.
 22 TR:10/12/07; pp 13-14.²

23 ³ As the Court will recall, ICE agent Purfeerst reported that the protected informant labeled SA-1180-SF, claimed
 24 that “Glen Silva employs illegal aliens, helps them secure counterfeit documents and aids in their obtaining
 25 California Driver’s Licenses.” SA-1180-SF told agent Purfeerst that Mr. Silva helped obtain fake social security
 license. As we know, none of these allegations proved true.

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1 powers are necessary to intervene because three government material witnesses have already
 2 testified that Mr. Silva did not commit criminal acts. Plus, after a full evidentiary hearing, the
 3 California Department of Labor has found that the prosecution's cooperator, Silvano Santos, was
 4 the "employer" at *Monterey Pizza*, not Mr. Silva.

SELECTIVE AND ARBITRARY PROSECUTION

5 Prosecutorial discretion is broad, but not without constitutional limitation. Wayte v. United
 6 States, 470 U.S. 598, 607 (1985). Subject to the constraints of the Equal protection Clause, the
 7 decision to prosecute may not be based on an unjustifiable standard such as race, gender, religion
 8 or *other arbitrary classifications*. Id. at 608 (emphasis added); J.E.B. v. Alabama ex. re. T.B.
 9 511 U.S. 127, 136 (1994)(holding that invidious discrimination on account of gender, no less
 10 than race or ethnicity, violates the Equal protection Clause).

11 In the recent case of United States v. Trimble, 487 F.3d 752 (9th Cir. 2007), the Ninth
 12 Circuit, although not on point, provided helpful insight in viewing criminal cases where arbitrary
 13 government action appears. In Trimble, the defendant was convicted of several petty offense
 14 traffic violations on federal property. Unlike other similarly situated defendants, Ms. Trimble
 15 had to pay a \$25.00 processing fee for her traffic convictions because a different style citation
 16 form was used in her case as opposed to others who received tickets that day. Although a mere
 17 \$25.00, the Court reversed the imposition of the fee. Analyzed under the basic principles of due
 18 process and notice, the Court found the government action arbitrary.

19 Similar arbitrary government action, where other suspected illegal alien employers or those
 20 who harbor illegal aliens are not criminally prosecuted, is evident in this case.

Two Other Worksite Enforcement Cases In the Bay Area

21 On October 5, 2005 when ICE agents arrested Mexican nationals who were working illegally
 22 at the Pacific American Service (PACAM) warehouse and distribution center which brings goods
 23 into the United States through the Port of Oakland. ICE agents apprehended illegal Mexican
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1 workers as they reported for work at PACAM's Hayward warehouse. The illegal workers were
 2 identified after agents audited the hiring records of more than 60 PACAM workers and found
 3 that approximately 25 percent of the employees were not authorized to work in the United States.
 4 No employer or manager at PACAM was arrested or prosecuted.

5 On May 2, 2008, 63 illegal aliens employed by a California restaurant chain were arrested by
 6 San Francisco ICE agents. *See Steven F. Gruel Declaration, Exhibit A [ICE press release].* The
 7 63 individuals were arrested on *administrative* immigration violations. No one, including the
 8 employer(s) was arrested on criminal charges. This arbitrary government action (criminal
 9 response versus administrative response) appears at the national level as well.

11 **Two Recent National Worksite Enforcement Cases**

12 Since the last appearance, ICE has executed at least two major worksite enforcement raids in
 13 Houston, Texas and Arlington, Washington. On June 25, 2008 ICE worksite agents arrested
 14 more than 160 employees at a Houston rag-exporting company. The next day, Seattle agents
 15 arrested 32 illegal workers at a Puget-Sound aerospace manufacturer plant. According to the
 16 ICE press releases, these raids were administrative, not criminal, responses to violations of the
 17 worksite laws. *See Gruel Declaration, Exhibit B [ICE press releases].*

18 **Sanctuary Cities – Alien Harboring With Impunity**

19 The arbitrary criminal prosecution against Mr. Silvia, in lieu of an administrative action, is
 20 even more pronounced when viewed against the backdrop that his pizzerias are in the federal
 21 district which includes two cities serving as highly publicized sanctuaries for illegal aliens.⁴

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 23 ⁴ Mr. Silvia requests that the Court take judicial notice that both the cities of San Francisco and Oakland have
 24 declared themselves as sanctuaries for illegal aliens. As in the documents previously filed with the Court,
 25 According to a February 2, 2008 press release, the Mayor of San Francisco underscored and reaffirmed the City's
 26 policy protecting undocumented aliens by assuring them of access to local government services without fear of
 reporting them to ICE. In 1989, San Francisco passed the "City of Refuge" Ordinance (Sanctuary Ordinance) which
 prohibits City employees from assisting ICE with detection, investigations and arrests unless required by federal or
 state law or a warrant. In February 2007, the San Francisco Mayor called on City departments to develop protocol
 and training on the Sanctuary Ordinance.

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1 Both San Francisco (1989) and Oakland (May 2007) have declared that they are sanctuary cities,
2 which according to federal law, would expose them to violations of alien harboring.

3 Amazingly, if Mr. Silva worked for San Francisco, or if his pizzeria was San Francisco
4 operated, he would be adhering to City law, with impunity, by not assisting ICE with illegal alien
5 detection. In other words, local policies and ordinances allow city employees to assist illegal
6 aliens avoid detection by federal authorities. This is a clear violation of the law regardless of
7 how well intentioned.

8 If nothing else, ICE's enforcement of worksite violations is bewildering. Major violators
9 receive a slap on the wrist or no action whatsoever, undocumented aliens are openly harbored as
10 they seek refuge in sanctuary cities, and yet a lone pizzeria owner with six undocumented
11 workers is caught up in the whirlpool of this federal criminal prosecution. Picking such "low
12 hanging fruit" might be palatable if the consequences of prison and deportation were not so life
13 altering for Mr. Silva.

More Arbitrary Enforcement Learned From The Government's Witnesses

14 Three government material witnesses have been deposed for trial. Each has testified that they
15 illegally worked at other pizzerias and at other jobs. Gilson De Araujo ("Gilson") testified that
16 he illegally worked at Round Table, Pizza Hut and North Beach Pizza. (TR: 10/12/07; pp 22;
17 37). Geraldo Rodrigues ('Geraldo') said that he worked at Geneva Pizza and did construction
18 work. ICE has not prosecuted these other employers.

THE COURT'S SUPERVISORY POWERS

19 The three legitimate bases for the exercise of the supervisory power are: (1) to remedy a
20 violation of a statutory or constitutional right; (2) to preserve judicial integrity; and (3) to deter
21 future illegal conduct. United States v. Simpson, 927 F.2d 1088, 1090 (9th Cir. 1991) The court's
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1 supervisory power may be used to vindicate a defendant's rights, as well as to preserve judicial
 2 integrity and/or to deter illegal or improper conduct. United States v. Hasting, 461 U.S. 499
 3 (1983). Given the facts in this case, all of the reasons justify the use of the Court's supervisory
 4 powers.

5 **Government Material Witnesses Exculpate Mr. Silvia of Alien Harboring**

6 The testimony from the government's material witnesses has not gone well for the
 7 prosecution. Testimony from Gilson, Wander and Geraldo, three suspected employees of the
 8 pizzerias, clearly established that Mr. Silva knew nothing about their illegal immigration status
 9 or that he purposely tried to shield them from ICE agents.⁵ Not surprisingly, the Court ordered
 10 fourth government material witness deposition of Andrea DeSouza was quickly cancelled by the
 11 government. This was likely because its previous witnesses had testified overwhelmingly
 12 favorably for Mr. Silva.

13 1. Gilson De Araujo: (TR:10/12/07; pp 1-61):

14 Gilson testified that Mr. Silva did not know that he was in the United States illegally and that
 15 they never discussed his immigration status. (TR: 10/12/07: pp. 46). Although the government
 16 fully knows that Gilson entered into a fraudulent marriage to stay in the United States, possessed
 17 counterfeit documents in the name of Gilvan Thomazele, overstayed his tourist visa several times
 18 and has completed his trial deposition, ICE released Gilson from custody. ICE has not
 19 prosecuted Gilson for the felony offense of marriage fraud. He remains in the United States.

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⁵ The complete transcripts from the October 12, 2007 depositions of Gilson De Araujo and Wander De Araujo ("Wander"), plus the April 16, 2008 deposition of Geraldo Rodrigues are attached for the record. See Gruel Declaration, Exhibit C (Gilson De Araujo), D (Wander De Araujo) and E (Geraldo Rodrigues).

1 2. **Wander De Araujo:** (TR:10/12/07; pp 1-35):

2 Wander said he did not talk to Mr. Silva about how he came to the United States and never
3 talked to Mr. Silva about being in the country illegally. (TR:10/12/07; pp 19). Wander also
4 testified that he didn't ask Mr. Silva if he could live at the *Pizza House* and just started living
5 there. (TR:10/12/07; pp 23).

6 3. **Geraldo Rodrigues:** (TR:04/16/07; pp 1-75):

7 Geraldo testified that he never told Mr. Silva that he was in the United States illegally.
8 (TR:04/16/07; p 45). Instead, he told Mr. Silva that he had a visa which was good for 10 years.
9 Geraldo testified that he never asked Mr. Silva if he could live a *Monterey Pizza* to avoid
10 immigration officials. (TR:04/16/07; p 68.)

11 Significantly, Geraldo told how the government cooperator Silvano Santos was the person
12 actually in charge of *Monterey Pizza*. In fact, Geraldo explained that Santos and his wife
13 instructed him to take \$23,000 in cash and break it down into two deposits for the same account
14 at two different branches of the Bank of America. (TR:04/16/07; p 63-65.)⁶

15 **The California Labor Department Determines Silvano Santos is the Employer**

16 While this prosecution has been proceeding, Silvano Santos, the government cooperator and
17 informant, filed a claim with the California Department of Labor alleging that Mr. Silva owed
18 him nearly \$85,000 for wages and benefits. On March 28, 2008, Labor Hearing Officer Regina
19 C. Pagalilauan conducted an evidentiary hearing on these wild claims. Significantly, on April
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24 ⁶ Information that the government's cooperator was illegally "structuring" a large cash for an unknown purpose was
25 provided by the defense long ago. To date, nothing has been provided to the defense which shows that ICE agents
did anything with this serious allegation.

1 24, 2008, Hearing Officer held against informant Santos and found that *he was in charge* of the
2 operations at *Monterey Pizza*, not Mr. Silva. *See* Gruel Declaration; Exhibit F [4/24/08 Order].
3 Notwithstanding this finding, albeit from a state agency, which places its informant directly
4 responsible for hiring illegal aliens in this case, Silvano Santos has not been criminally charged
5 by the government.
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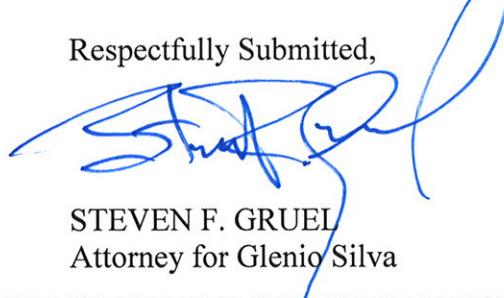
7 Admittedly, the defense can not direct the Court to any “on point” precedent which easily
8 paves the way for the Court’s supervisory powers in this case. But then again, it is the rare cases
9 with the unusual circumstances which warrant the Court’s intervention. The defense respectfully
10 requests that this is such a case.

CONCLUSION

12 In opposing Mr. Silva’s discovery request in support of his selective prosecution motion,
13 the government speculated that the defense motion stemmed from frustration and anger about the
14 prosecution. Actually, the government was partially correct. As outlined above, Mr. Silva has
15 reason to be frustrated, upset and confused. He is being criminally prosecuted for alleged
16 administrative worksite violations while similarly situated serious violators go free and while
17 the government’s own witnesses have exonerated him.
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19 Without question, the nation’s immigration issues and problems cover a wide range of issues
20 and beliefs. Spending limited government resources attempting to convict and the deport Glenio
21 Silva with *this* prosecution is not going to change anything.

22 Respectfully Submitted,
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25 STEVEN F. GRUEL
26 Attorney for Glenio Silva

Dated: June 30, 2008

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